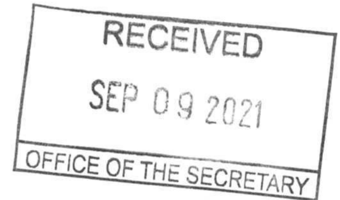

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data	File No. 4-757 Release No. 34-92586 (Aug. 6, 2021)

MOTION FOR STAY OF JOINT INDUSTRY PLAN; ORDER APPROVING, AS MODIFIED, A NATIONAL MARKET SYSTEM PLAN REGARDING CONSOLIDATED EQUITY MARKET DATA BY THE NASDAQ STOCK MARKET LLC, NASDAQ BX, INC., NASDAQ PHLX LLC, NEW YORK STOCK EXCHANGE LLC, NYSE AMERICAN LLC, NYSE ARCA, INC., NYSE CHICAGO, INC., NYSE NATIONAL, INC., CBOE BYX EXCHANGE, INC., CBOE BZX EXCHANGE, INC., CBOE EDGA EXCHANGE, INC., CBOE EDGX EXCHANGE, INC., AND CBOE EXCHANGE, INC.

The Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe Exchange, Inc. ("Petitioners") hereby request that the Securities and Exchange Commission (the "Commission") stay its Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-92586, 86 Fed. Reg. 44,142 (Aug. 11, 2021) (the "CT Plan Order").

Petitioners request this stay pending final resolution of their petitions for review challenging the CT Plan Order and the now-final Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 88827, 85 Fed. Reg. 28,702 (May 13, 2020) (the "NMS Governance Order"), which Petitioners filed in the D.C. Circuit on August 9, 2021.

Dated: August 19, 2021

Respectfully submitted,

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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of: Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data	File No. 4-757 Release No. 34-92586 (Aug. 6, 2021)

BRIEF IN SUPPORT OF MOTION FOR STAY OF JOINT INDUSTRY PLAN; ORDER APPROVING, AS MODIFIED, A NATIONAL MARKET SYSTEM PLAN REGARDING CONSOLIDATED EQUITY MARKET DATA

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TABLE OF CONTENTS

Page

INTRODUCTION 1

LEGAL STANDARD 4

ARGUMENT 5

I. All Four Of The Traditional Equitable Factors Support A Stay. 5

A. Petitioners Are Likely To Succeed On The Merits Of Their Challenge To The CT Plan Order 5

B. Petitioners Will Suffer Irreparable Harm In The Absence Of A Stay. 13

C. No Substantial Harm Would Result From A Stay And Its Imposition Would Further The Public Interest 15

II. A Stay Should Be Entered Because Justice So Requires 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Methyl Corp. v. EPA,
749 F.2d 826 (D.C. Cir. 1984) 8

Chaplaincy of Full Gospel Churches v. England,
454 F.3d 290 (D.C. Cir. 2006) 14

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984)...7

Del. Dep't of Natural Res. & Envt'l Control v. EPA,
785 F.3d 1 (D.C. Cir. 2015) 12

Ethyl Corp. v. EPA,
51 F.3d 1053 (D.C. Cir. 1995) 6, 7

FCC v. Fox Television Stations, Inc.,
556 U.S. 502 (2009)...11

Halverson v. Slater,
129 F.3d 180 (D.C. Cir. 1997) 8

Indep. Ins. Agents of Am., Inc. v. Hawke,
211 F.3d 638 (D.C. Cir. 2000) 8

Lilliputian Sys., Inc. v. PHMSA,
741 F.3d 1309 (D.C. Cir. 2014) 11

Lyng v. Payne,
476 U.S. 926 (1986)...7

Md. People's Counsel v. FERC,
761 F.2d 768 (D.C. Cir. 1985) 12

N.Y. Stock Exchange LLC v. SEC,
962 F.3d 541 (D.C. Cir. 2020) 6

Nasdaq Stock Market LLC v. SEC,
1 F.4th 34 (D.C. Cir. 2021) 2

Nielsen v. Preap,
139 S. Ct. 954 (2019)..8

Pfizer, Inc. v. Heckler,
735 F.2d 1502 (D.C. Cir. 1984) 10

Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.,
29 F.3d 655 (D.C. Cir. 1994) 7

Statutes

5 U.S.C. § 705 .... 4, 18

15 U.S.C. § 78c(a)(26) 11

15 U.S.C. § 78f(b)(1) 9

15 U.S.C. § 78f(b)(5) 9

15 U.S.C. § 78k-1(a)(3)(A) 7

15 U.S.C. § 78k-1(a)(3)(B) 5, 7, 10

15 U.S.C. § 78k-1(d) 7

15 U.S.C. § 78o-3(b)(2) 9

15 U.S.C. § 78o-3(b)(6) 9

15 U.S.C. § 78q-1(b)(3)(A) 9

15 U.S.C. § 78q-1(b)(3)(F) 9

15 U.S.C. § 78s(g) 9

15 U.S.C. § 78y(c)(2) 2, 4, 17, 18

Regulations

17 C.F.R. § 242.608(a)(2) 9

17 C.F.R. § 242.608(a)(3)(iii) 9

17 C.F.R. § 242.608(a)(4) 9

17 C.F.R. § 242.608(a)(6) 9

17 C.F.R. § 242.608(b)(2) 9

17 C.F.R. § 242.608(c) 11

Other Authorities

In re Motion of Business Roundtable and the Chamber of Commerce of the United States of America for Stay of Effect of Commission's Facilitating Shareholder Director Nominations Rules,
Release No. 9149, 2010 WL 3862548 (Oct. 4, 2010) 5, 18

In re Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data,
Release No. 89066, 85 Fed. Reg. 36,921 (June 18, 2020) 15, 17

Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data,
Release No. 88827, 85 Fed. Reg. 28,702 (May 13, 2020) 7, 10, 11

Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications,
Release No. 33870, 1994 WL 117920 (Apr. 7, 1994) 4

In re Petroleum Inst.,
Release No. 68197, 2012 WL 5462858 (Nov. 8, 2012) 4, 13

In re Rule 610T of Regulation NMS,
Release No. 85447, 2019 WL 1424351 (Mar. 28, 2019) 19

Transaction Fee Pilot for NMS Stocks,
Release No. 84875, 84 Fed. Reg. 5,202 (Feb. 20, 2019) 18

INTRODUCTION

The Commission should exercise its authority under the Administrative Procedure Act (the "APA"), 5 U.S.C. § 705, and Section 25(c)(2) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78y(c)(2), to stay the effectiveness of the CT Plan Order pending resolution of Petitioners' petitions for review.

The CT Plan Order approves, with modifications, a new equity market data plan (the "CT Plan")—submitted by Petitioners and other self-regulatory organizations ("SROs") pursuant to the Commission's mandate in the NMS Governance Order—that profoundly alters the governance of the core-data feed. Once it becomes operational, the CT Plan will displace the three existing National Market System ("NMS") plans that currently govern the consolidation and distribution of core data—the Consolidated Tape Association Plan, the Consolidated Quotation System Plan, and the Unlisted Trading Privileges Plan ("Equity Data Plans")—and will impose an unprecedented, and legally flawed, governance structure on the core-data feed. As required by the NMS Governance Order, the CT Plan, for the first time, will give individuals representing non-SROs voting power on the operating committee of an NMS plan, and it will further dilute the voting power of exchanges that share a corporate affiliation by allocating votes to "exchange groups," rather than to each individual affiliated exchange. The CT Plan also will prevent the current plan administrators, the New York Stock Exchange LLC and The Nasdaq Stock Market LLC, from serving as the administrator of the new plan and instead mandates the selection of an "independent" administrator that is not affiliated with an entity that distributes its own proprietary market data products. In addition, the CT Plan Order imposes an aggressive implementation timeline that is substantially more accelerated than the timeline proposed by the SROs.

Petitioners have filed petitions for review of the CT Plan Order, as well as the now-final NMS Governance Order, in the D.C. Circuit, *see* Petition for Review, *Nasdaq Stock Market LLC*

v. SEC, No. 21-1167 (D.C. Cir. Aug. 9, 2021); *Cboe BYX Exchange, Inc. v. SEC*, No. 21-1168 (D.C. Cir. Aug. 9, 2021); *N.Y. Stock Exchange LLC v. SEC*, No. 21-1169 (D.C. Cir. Aug. 9, 2021). The Commission should grant a stay of the CT Plan Order pending the D.C. Circuit's resolution of those petitions for two reasons. First, a stay should be entered because all four of the equitable factors that the Commission traditionally applies in determining whether to issue a stay weigh in favor of relief. Second, even without regard to the traditional four factors, a stay should be entered because "justice so requires." 15 U.S.C. § 78y(c)(2). And while the Commission previously denied a stay of the NMS Governance Order, developments since that ruling—including concerns expressed during the NMS Governance Order oral argument about the Commission-mandated voting structure and the aggressive implementation timeline for the CT Plan—provide additional, compelling support for a stay.

With respect to the traditional equitable factors, Petitioners have a substantial likelihood of success on the merits of their challenge to the CT Plan Order. Specifically, the Commission lacks authority under the Exchange Act and its own rules to vest individuals representing non-SROs with voting power on the operating committee of the CT Plan or to allocate votes based on its new "exchange group" concept. Tellingly, during the oral argument in the NMS Governance Order case, Judge Tatel emphasized that Petitioners had offered a "strong argument" that it was unlawful for the Commission to provide voting power to individuals representing non-SROs. Transcript of Oral Argument at 33:5, *Nasdaq Stock Market LLC v. SEC*, 1 F.4th 34 (D.C. Cir. 2021), No. 20-1181. In addition, the Commission's requirement of an "independent" administrator for the CT Plan is arbitrary and capricious because, among other reasons, the requirement would impose substantial costs on the plan without yielding any offsetting benefits.

Moreover, absent a stay, Petitioners will suffer immediate irreparable harm. The Commission modified Petitioners' proposed plan by adopting an aggressive implementation timeline that requires the SROs to operationalize the CT Plan in just one year. CT Plan Order at 20. That timeline will impose significant costs and burdens on Petitioners, as well as other SROs tasked with implementing the CT Plan, including the expenses associated with selecting and onboarding a new "independent" administrator, renegotiating contracts with processors and tens of thousands of subscribers, and developing new processes and procedures for the plan. If the CT Plan Order is vacated by the D.C. Circuit, it will be impossible for Petitioners to recoup those out-of-pocket expenditures.

The final two elements also support Petitioners' request because there would be no substantial harm arising from a stay, and, in fact, the public interest would be advanced by a stay. A stay would not interfere with the dissemination of core data to market participants because, during the pendency of the stay, the consolidation and distribution of core data would continue to be governed by the existing Equity Data Plans—just as would be the case under the one-year implementation period built into the CT Plan. In contrast, if the CT Plan were allowed to take effect and then later needed to be unwound due to a D.C. Circuit decision vacating the CT Plan Order, the result would be far-reaching regulatory confusion and uncertainty, which could seriously disrupt the distribution of core data. Indeed, the accelerated timeline set out in the CT Plan Order creates the real risk that the existing Equity Data Plans will cease to exist before a final decision of the D.C. Circuit. Thus, if the CT Plan Order is vacated after the plan has become operational, there would be no plan in place to govern the dissemination of core data, threatening significant market destabilization. The pernicious consequences of that regulatory disruption would fall particularly heavily on retail investors, who are more likely to rely on the core-data feed

than other market participants. In addition, the absence of any effective national market system plan for the dissemination of consolidated market data would force the SROs into a situation where they were no longer in compliance with Rule 603(b) and where they would have to engage in a time-consuming and costly effort to propose a new plan or plans, renegotiate contracts, and propose new fee schedules.

Accordingly, all of the traditional equitable factors support the issuance of a stay, and justice requires a stay, because a stay would safeguard the market and market participants from needless costs, disruption, and uncertainty. The Commission should grant a stay to preserve the status quo while the D.C. Circuit assesses the validity of the CT Plan Order.

LEGAL STANDARD

The Commission has discretion under the APA and Exchange Act to stay implementation of agency action when it "finds that justice so requires." 5 U.S.C. § 705; 15 U.S.C. § 78y(c)(2). The Commission often employs a four-factor analysis borrowed from general equitable principles when evaluating an application for a stay, considering:

> 1. [W]hether there is a strong likelihood that a party will succeed on the merits in a proceeding . . . (or, if the other factors strongly favor a stay, that there is a substantial case on the merits);
> 2. [W]hether, without a stay, a party will suffer imminent, irreparable injury;
> 3. [W]hether there will be substantial harm to any person if the stay were granted; and
> 4. [W]hether the issuance of a stay would likely serve the public interest.

In re Petroleum Inst., Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012). The Commission's assessment of these factors is flexible, and "[i]f the arguments for one factor are particularly strong, a stay may be appropriate even if the arguments on the other factors are less convincing." *Id.*; *see also* Order Preliminarily Considering Whether to Issue Stay Sua Sponte and

Establishing Guidelines for Seeking Stay Applications, Release No. 33870, 1994 WL 117920, at *1 (Apr. 7, 1994) ("The evaluation of these factors will vary with the equities and circumstances of each case."). Even where an applicant has not shown a likelihood of success on the merits, the Commission may order a stay to "avoid[ ] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rule[ ]" or other agency action "were to become effective during the pendency of a challenge to [its] validity." *In re Motion of Business Roundtable and the Chamber of Commerce of the United States of America for Stay of Effect of Commission's Facilitating Shareholder Director Nominations Rules*, Release No. 9149, 2010 WL 3862548, at *1 (Oct. 4, 2010).

ARGUMENT

I. All Four Of The Traditional Equitable Factors Support A Stay.

All four of the traditional equitable factors weigh in favor of a stay of the CT Plan Order pending resolution of Petitioners' petitions for review.

A. Petitioners Are Likely To Succeed On The Merits Of Their Challenge To The CT Plan Order.

Petitioners have a substantial likelihood of persuading the D.C. Circuit that one or more features of the CT Plan Order violates the Exchange Act, the Commission's own rules, and/or the APA.[*]

First, the CT Plan Order unlawfully vests representatives of non-SROs with voting power on the plan's operating committee. CT Plan Order at 56. Section 11A of the Exchange Act empowers the Commission only to "authorize or require *self-regulatory organizations* to act jointly *with respect to matters as to which they share authority under this chapter* in planning,

[*] This Motion does not present an exhaustive list of the legal deficiencies in the CT Plan Order, and Petitioners reserve the right to raise additional arguments in the D.C. Circuit.

developing, operating, or regulating a national market system." 15 U.S.C. § 78k-1(a)(3)(B) (emphases added). The Commission nevertheless contends that Congress gave it "discretion" to determine "how such joint action should occur" because nothing in Section 11A expressly "precludes the involvement of non-SROs in the national market system." CT Plan Order at 58, 60.

The Commission's reasoning is legally flawed and, as indicated by the panel's questioning during the NMS Governance Order oral argument, likely to be rejected by the D.C. Circuit for the reasons identified by Petitioners in that case. *See* Transcript of Oral Argument at 33:5, *Nasdaq Stock Market LLC*, No. 20-1181 (Judge Tatel referring to Petitioners' "strong argument" challenging the Commission-mandated voting structure); *see also* Opening Brief for Petitioners at 28-56, *The Nasdaq Stock Market LLC v. SEC*, No. 20-1181 (D.C. Cir. Mar. 12, 2021); Reply Brief for Petitioners at 4-28, *The Nasdaq Stock Market LLC*, No. 20-1181 (D.C. Cir. Mar. 12, 2021). Indeed, the D.C. Circuit recently rejected a nearly identical claim by the Commission of implied rulemaking authority, holding that absent a specific congressional delegation, it does not "matter that a disputed agency action is not expressly foreclosed by the statute." *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 557 (D.C. Cir. 2020).

In particular, the Commission's interpretation of Section 11A squarely contravenes the general rule that Congress's "mention of one thing implies exclusion of another thing" (or *expressio unius est exclusio alterius*). *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (internal quotation marks omitted). Section 11A explicitly grants the Commission the power to direct "self-regulatory organizations" to act jointly as to certain matters where they "share authority" under the Exchange Act, but contains *no* language suggesting that the Commission's power extends to non-SROs or their representatives, which do not "share authority" with SROs

under the Act. Instead, Congress decided that non-SROs would serve only in "advisory" roles under Section 11A(a)(3)(A) and (d).

The Commission may not infer the power to grant votes to individuals representing non-SROs from purported statutory silence. *See* CT Plan Order at 60; NMS Governance Order, 85 Fed. Reg. at 28,715. The principle that agencies are afforded deference in their interpretation of statutory silence is inapplicable here because there is no relevant statutory silence for the Commission to fill. The principle relied upon by the Commission applies only if "traditional tools of statutory construction" are insufficient to resolve the interpretive question. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The Exchange Act is not silent regarding the persons the Commission may direct to "act jointly" to plan, develop, operate, and regulate the national market system, but rather expressly grants the Commission that authority *only* with respect to SROs, which are the only entities that "share authority" under the Exchange Act with respect to such matters. 15 U.S.C. § 78k-1(a)(3)(B). And the Act also establishes the different, "*[a]dvisory*" role that the Commission may assign to non-SROs in connection with implementation of the National Market System. *Id.* § 78k-1(a)(3)(A) & (d) (emphasis added). Accordingly, both the plain language of the Act and the *expressio unius* canon—a well-settled tool of statutory construction—independently foreclose the Commission's reliance on purported statutory silence to grant voting power to representatives of non-SROs.

Relatedly, it is well-settled that "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). The D.C. Circuit therefore has "categorically reject[ed]" the suggestion that an agency "possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994); *see also Ethyl*

Corp., 51 F.3d at 1060 (holding that the notion that an agency may take action "any time a statute does not expressly *negate* the existence of a claimed administrative power" is "both flatly unfaithful to the principles of administrative law and refuted by precedent" (alteration omitted)). Consistent with that authority, the D.C. Circuit has on several occasions applied the principle of *expressio unius* to reject agencies' attempts to rely on a statute's purported silence in order to expand their own authority. *See Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643-45 (D.C. Cir. 2000); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997); *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 836 (D.C. Cir. 1984).

The Commission's open-ended interpretation of Section 11A's "act jointly" language not only contravenes the statutory text and applicable precedents, but also disregards the general rule that "every word and every provision [in a statute] is to be given effect and that none should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (alteration and internal quotation marks omitted). Section 11A's reference to "self-regulatory organizations" would be entirely superfluous if, as the Commission contends, the statute does not in fact limit the Commission's "act jointly" authority to SROs *alone*.

In a footnote, the Commission contends that Congress included the specific reference to SROs in Section 11A to shield SROs from allegations of anticompetitive collusion (although it cites only its *own* prior orders in support of that contention). CT Plan Order at 60 n.242. If a specific reference to SROs were necessary to insulate their joint action from antitrust liability, however, that same logic would apply to non-SROs and their representatives—yet, Section 11A says nothing about those entities. Thus, the Commission's own reasoning undermines its interpretation of Section 11A.

The Commission's interpretation is also inconsistent with the structure and design of the Exchange Act. SROs have a range of unique regulatory responsibilities, including statutory obligations to "protect investors and the public interest," 15 U.S.C. §§ 78f(b)(5), 78o-3(b)(6), 78q-1(b)(3)(F), and to enforce compliance with their rules, *see id.* §§ 78f(b)(1), 78o-3(b)(2), 78q-1(b)(3)(A), 78s(g). It therefore makes sense that Congress would entrust SROs with responsibility for administering the national market system. But individual representatives of non-SROs do not share those regulatory obligations and instead are free to act entirely in their own self-interest. The Commission's interpretation of Section 11A disrupts the design of the Exchange Act by shifting responsibility for developing, operating, and regulating the national market system away from the highly regulated SROs that Congress entrusted with those important responsibilities to individuals with no duty to protect the public interest.

Moreover, even if the Exchange Act did not foreclose the Commission's effort to grant voting power to representatives of non-SROs, the Commission's own rules plainly do. Rule 608 is more specific than Section 11A, expressly authorizing "[s]elf-regulatory organizations"—but not non-SROs or their representatives—to "act jointly in . . . [i]mplementing or administering an effective national market system plan." 17 C.F.R. § 242.608(a)(3)(iii). The Rule confirms that only SROs are empowered to make NMS plan decisions subject to Commission review, because it assigns to SROs alone the functions of developing and administering NMS plans. 17 C.F.R. § 242.608(a)(2), (a)(4), (a)(6), (b)(2). The Commission contends that Rule 608 "does not by implication limit the Commission's authority to set forth a governance structure that includes non-SROs with some measure of voting power," CT Plan Order at 60, but offers no explanation for why it would be acceptable for the Commission to disregard the plain language of Rule 608 and read in a reference to individuals representing non-SROs that appears nowhere in the Rule's

text and contradicts the Rule's exclusive allocation of authority to SROs. The unambiguous language of Rule 608 is binding on the Commission until the Commission repeals or amends the Rule. *See Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984).

Second, the CT Plan Order impermissibly allocates operating committee votes to "exchange groups"—rather than to each individual affiliated exchange—with each group limited to a maximum of two votes, no matter the number of exchanges in the group. CT Plan Order at 81-82. As a result, individual affiliated exchanges—which are required to maintain independent operations in every other respect—will be forced to share their votes with other affiliated exchanges, while each non-affiliated exchange will retain a full vote on the operating committee (as each individual exchange possesses today on the operating committees of the Equity Data Plans). *See id.* Not only will this voting structure dilute the voting power of affiliated exchanges, but, as a result of the empowerment of non-SRO voting representatives and the Commission's "augmented majority vote" structure, it also is intended to enable the non-SRO voting representatives to join with a *minority* of individual SROs to take action opposed by a majority of individual SROs. *See id.* at 90. The Commission's exchange-group-based voting structure therefore thwarts SROs' ability to "act jointly" in "planning, developing, [and] operating" the national market system, 15 U.S.C. § 78k-1(a)(3)(B), by enabling the non-SRO voting representatives and a minority of individual SROs to override the will of the majority of individual SROs.

Despite acknowledging in the NMS Governance Order that the Exchange Act requires that "at all times the SROs have sufficient voting power to act jointly," NMS Governance Order, 85 Fed. Reg. at 28,721, the Commission unequivocally embraces this dilution of affiliated exchanges' voting power, *see* CT Plan Order 90, and defends the imposition of exchange-group-based voting

on the ground that "there is no statutory or regulatory provision that mandates 'one SRO, one vote.'" CT Plan Order at 83. The Exchange Act, however, expressly defines "self-regulatory organization" to mean "*any* national securities exchange," 15 U.S.C. § 78c(a)(26) (emphasis added), and thus precludes the Commission from distinguishing between affiliated and unaffiliated exchanges in allocating SRO votes on the CT Plan's operating committee.

The flaws in the Commission's exchange-group-based voting model are further underscored by the fact that, in virtually every other respect, the Commission treats individual exchanges as independent SROs, each with its own regulatory obligations and responsibilities, without regard to whether they are affiliated with other exchanges. Indeed, the Commission directed each *individual* SRO to file the proposed CT Plan with the Commission, NMS Governance Order, 85 Fed. Reg. at 28,731, and each *individual* SRO is responsible for complying with the CT Plan under Rule 608, 17 C.F.R. § 242.608(c). The Commission attempts to justify this disparity by contending that "the applicable legal requirements and the function being performed here by the SROs differ in th[is] context," CT Plan Order at 83—without explaining *how* those requirements and functions differ. The Commission's *ipse dixit* that differential treatment of affiliated and unaffiliated exchanges is warranted here but not elsewhere does not constitute reasoned decisionmaking, *see Lilliputian Sys., Inc. v. PHMSA*, 741 F.3d 1309, 1313 (D.C. Cir. 2014), or provide an adequate justification for the Commission's departure from its longstanding practice of treating each exchange as a separate SRO for regulatory purposes, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Third, the CT Plan Order arbitrarily and capriciously requires that the administrator of the CT Plan be "independent," meaning that the administrator "may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own [proprietary

data products]." CT Plan Order at 200. According to the Commission, the independence requirement is necessary because of the potential that an administrator affiliated with an entity that sells proprietary data products could use customer audit information for its affiliate's financial benefit. *See id.* at 202-04.

The CT Plan Order's "independent" administrator requirement falls short of the threshold for reasoned decision-making because the Commission fails to substantiate its abstract concern about supposed conflicts of interest with any evidence that the current administrators—who have served in that role for years—have ever misused customer audit data or that the combination of existing safeguards and new confidentiality measures imposed by the CT Plan Order will be insufficient to eliminate that purported risk. *See Del. Dep't of Nat. Res. & Envt'l Control v. EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015). Nor does the Commission demonstrate, as the APA requires, that "more good than harm will come of its action." *Md. People's Counsel v. FERC*, 761 F.2d 768, 779 (D.C. Cir. 1985). On the contrary, the Commission admits that there will be substantial costs associated with the transition to a new administrator lacking the experience and expertise of the current administrators. *See* CT Plan Order at 205. While the Commission perfunctorily claims that these costs are justified, *see id.* at 205-06, it provides no reasoned analysis for that conclusion or for its decision to prohibit the current administrators, but not non-SRO data vendors (who have none of the SROs' statutory obligations to "protect investors and the public interest," yet by definition suffer from the same purported conflict of interest that the Commission deems disqualifying for SROs) from serving as the administrator, *see id.* at 207-08.

* * *

For each of these reasons, among others, there is a substantial likelihood that Petitioners will prevail on the merits of their challenge to the CT Plan Order. At the very least, Petitioners

have shown that there is a "substantial case on the merits," *In re Petroleum Inst.*, 2012 WL 5462858, at *2, which, together with Petitioners' strong showing under the other elements discussed below, is sufficient to warrant a stay of the CT Plan Order.

B. Petitioners Will Suffer Irreparable Harm In The Absence Of A Stay.

Absent a stay, Petitioners will suffer immediate irreparable harm as a direct result of the obligations imposed on them by the CT Plan Order.

Over Petitioners' objections, the Commission modified their proposed plan to impose a highly aggressive implementation schedule for the CT Plan that the Commission itself recognizes as "'ambitious'" and presenting "challenges." CT Plan Order at 14, 19. The Commission's schedule provides that:

- Within ten days of the issuance of the CT Plan Order (August 16, 2021), the SROs must file the paperwork with the State of Delaware necessary to create a limited liability company ("LLC");
- Within two months of the issuance of the CT Plan Order (October 6, 2021), the SRO voting representatives and the non-SRO voting representatives must be selected;
- Beginning three months after issuance of the CT Plan Order (November 6, 2021) and every three months thereafter until the plan becomes operational, the operating committee must provide a public written report to the Commission regarding the steps taken to implement the CT Plan;
- Within four months of the issuance of the CT Plan Order (December 6, 2021), the operating committee must file a proposed fee schedule with the Commission;
- Within eight months of the issuance of the CT Plan Order (April 6, 2022), the operating committee must renegotiate and enter into contracts with the existing processors and must select and enter into a contract with a new "independent" administrator;
- Within one year of the issuance of the CT Plan Order (August 6, 2022), the operating committee must ensure that the administrator and processors have developed, implemented, and tested the systems necessary for the distribution of core market data, including dissemination systems, billing and audit systems, and contracts with vendors and subscribers; and

- Within one year of the issuance of the CT Plan Order (August 6, 2022), the operating committee must become operational as the governing framework for the dissemination of core market data and displace the existing Equity Data Plans.

CT Plan Order at A-2-A-3.

This expedited timetable means that Petitioners (as well as the other SROs that are plan members) have already begun to incur costs, and will continue to incur additional costs over the next year, in the course of forming an LLC; preparing status reports to the Commission developing new fee schedules; entering into new contracts with the processors, identifying, negotiating with, and retaining a new "independent" administrator, who would then need to develop CT Plan-specific billing systems and enter into new contractual relationships with tens of thousands of data subscribers; formulating new policies and procedures for the plan's operations; and ensuring that the administrator and processors have all of the necessary systems in place to facilitate a transition from the Equity Data Plans to the CT Plan by the Commission's one-year deadline. Moreover, Petitioners will be required to use their own funds to cover these expenses—including the out-of-pocket expenditures incurred by hiring counsel to negotiate contracts and advise on legal and regulatory matters, as well as technical and administrative consultants to advise on the myriad technical and administrative issues raised by creation of a new plan—because the CT Plan does not currently have a source of revenue.

Neither these out-of-pocket expenditures nor the substantial time and effort devoted to plan implementation by Petitioners' personnel will be recoverable in the event that the D.C. Circuit invalidates the CT Plan Order. This imposition of unrecoverable costs and implementation burdens constitutes irreparable harm that justifies a stay. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (explaining that the irreparable-harm inquiry looks

to whether "adequate compensatory or other corrective relief will be available at a later date" (internal quotation marks omitted)).

The Commission's order denying Petitioners' motion for a stay of the NMS Governance Order appeared to acknowledge that Petitioners will incur substantial costs in implementing the CT Plan. *See In re Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data*, Release No. 89066, 85 Fed. Reg. 36,921 (June 18, 2020) ("NMS Governance Order Stay Ruling"). There, the Commission downplayed the harm arising out of the NMS Governance Order because that order did not "establish a New Consolidated Data Plan" and instead required only that the SROs "file a proposed plan with the Commission," which the SROs could supposedly accomplish by "import[ing]" the "detailed provisions relating to the operation of the existing Equity Data Plans." *Id.* at 36,921. But the CT Plan Order *does* "establish a New Consolidated Data Plan" and requires Petitioners to undertake the "'ambitious project'" of taking all necessary steps to enable "the CT Plan to become operational within one year." CT Plan Order at 19. Thus, the very harms deemed absent by the Commission in its prior order are now present.

C. No Substantial Harm Would Result From A Stay And Its Imposition Would Further The Public Interest.

A stay of the CT Plan Order would not inflict substantial harm on others but instead would promote the public interest by preserving market stability and regulatory certainty.

If permitted to take effect, the CT Plan Order will not yield any immediate benefits for market participants because, even under the Commission's highly accelerated implementation timeline, the CT Plan will not become operational for one year. During the interim period, the existing Equity Data Plans will continue to govern the consolidation and dissemination of core data. Accordingly, a stay that enables the D.C. Circuit to assess the validity of the CT Plan Order

before the one-year implementation period commences will not deprive the public of any benefit it otherwise would have enjoyed during the pendency of the litigation.

Moreover, in the event that the D.C. Circuit upholds the CT Plan Order, the delay in implementation will not substantially harm the public. Any public benefit that might be generated by the CT Plan Order is purely speculative because the operating committee of the CT Plan may set the fees for core data at the same level as they are now (or may even set them higher than current levels) and may not undertake any enhancements to the current core-data feed beyond those that the operating committees of the existing Equity Data Plans otherwise would have implemented. A stay therefore will not deprive the public of any benefits or inflict harm on the market or market participants.

In contrast, the public interest would be seriously impaired in the absence of a stay. If Petitioners implement the CT Plan on the one-year timetable mandated by the Commission, but the CT Plan Order is thereafter vacated, the result would be widespread regulatory confusion and potential paralysis, as well as wasted time, effort, and expenditures by the administrator candidates that submitted applications to the now-vacated CT Plan and the hundreds of vendors and tens of thousands of subscribers that entered into contracts with that plan.

Most troublingly, a D.C. Circuit ruling vacating the CT Plan Order after it becomes operational would eliminate the body governing the distribution of core data and leave the public with no operative plan for data distribution. The SROs would be required to create new plans, including operating committees, fee schedules, and contractual relationships with administrators, processors, and subscribers in order to come into compliance with their ongoing obligations under Rule 603(b). Thus, a decision vacating the CT Plan Order after the new plan becomes operative on or before August 6, 2022 would create a serious risk that the distribution of core data would be

interrupted because the decision would result in the absence of an NMS Plan governing the collection, consolidation, and dissemination of core data. This regulatory vacuum would have profoundly disruptive consequences for all market participants and especially for those retail investors who rely on the core-data feed to make informed trades.

The D.C. Circuit's vacatur of the CT Plan Order would also complicate the implementation of the Commission's Market Data Infrastructure Rule, Release No. 34-90610, 86 Fed. Reg. 18,596 (Apr. 9, 2021), by raising questions about the validity of actions taken by the CT Plan's operating committee to facilitate the far-reaching changes to the core-data feed contemplated by that Rule. And, if the vacatur occurred after the operative date for the CT Plan—and thus after the existing plans cease to exist—then there would be no plan in place at all to fulfill the mandated plan obligations under the Market Data Infrastructure Rule.

Moreover, unlike the NMS Governance Order—which, in the Commission's view, did not necessitate "actions . . . that would have to be unwound in the absence of a stay," 85 Fed. Reg. at 36,922—a decision invalidating the CT Plan Order would raise a host of legally complicated and practically fraught questions about the validity of actions already taken by the CT Plan and the prospective implications of those actions. The uncertainty that will exist while the litigation is pending will complicate efforts to implement the CT Plan Order, including by potentially dissuading firms that otherwise might consider applying to become the new administrator from doing so given that, even if a firm is successful and named the administrator, the firm may later lose that position and its investment of substantial time and money if the D.C. Circuit invalidates the CT Plan Order.

In light of the speculative benefits of the CT Plan Order, there is no reason to risk inflicting these serious harms on the market, which could be averted by granting a stay pending the outcome of Petitioners' pending challenge to the order.

II. A Stay Should Be Entered Because Justice So Requires.

Even without applying the traditional four-factor test, a stay is warranted because "justice so requires." 15 U.S.C. § 78y(c)(2).

The Commission may stay an order "pending judicial review if it finds that justice so requires." 15 U.S.C. § 78y(c)(2); *see also* 5 U.S.C. § 705 (agency may postpone the effective date of an action pending judicial review when "justice so requires"). Although the Commission may find it instructive to consider the four equitable factors that courts examine when evaluating requests for a stay, the Commission is not required to consider those factors when deciding whether "justice so requires" a stay pending judicial review. For example, the Commission applied a more flexible approach when granting a stay pending judicial review of its final rules regarding proxy access for shareholder director nominations. *See Business Roundtable*, 2010 WL 3862548 (Oct. 4, 2010). In that decision, the Commission expressly did not "address[ ] the merits of petitioners' challenge to the rules" and instead exercised its discretion to grant a stay because "justice so require[d]." *Id.* at *1. The Commission found that a stay was "consistent with what justice require[d]" because, among other reasons, "a stay avoid[ed] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity." *Id.*

Similarly, in 2019, the Commission promulgated a rule that would have implemented a "Transaction Fee Pilot" to test the effect of new limits on transaction fees and rebates across hundreds of securities. *See* Transaction Fee Pilot for NMS Stocks, Release No. 84875, 84 Fed. Reg. 5,202 (Feb. 20, 2019). Upon application by several exchanges, the Commission stayed the

critical portion of the rule pending judicial review, finding that such a stay "appropriately balance[d] the Commission's statutory duty to ensure the economically efficient execution of securities transactions, the public interest, and the harms petitioners assert they would suffer should the Pilot proceed during the pendency of litigation." *In re Rule 610T of Regulation NMS*, Release No. 85447, 2019 WL 1424351, at *1 (Mar. 28, 2019). The Commission expressly declined to "address[ ] the merits of petitioners' challenges to the Rule or the Pilot program" and focused instead on the potential harms that would arise were the pilot vacated by the D.C. Circuit after it had become operative. *Id.*

A stay is warranted here for similar reasons. As discussed above, a stay would have no adverse effects. At the same time, it would protect Petitioners (as well as many third parties, including vendors and the administrator) from incurring significant and potentially unnecessary out-of-pocket costs during the pendency of the litigation, and eliminate the risk of substantial regulatory uncertainty regarding, and potential disruptions to, the dissemination of core data, which could inflict far-reaching harm on the market, market participants, and the public. Issuance of a stay is therefore consistent with what justice requires, the Commission's past practice, and the Commission's statutory mandate to protect investors and the markets. Indeed, entry of a stay would demonstrate that the Commission is acting as a sound overseer of the financial markets and that it is taking a thoughtful, measured approach to implementation of the CT Plan Order. Simply put, there is much to gain and nothing to lose by staying the CT Plan Order pending judicial review.

CONCLUSION

The Commission should stay the CT Plan Order pending resolution of the petitions for review in the D.C. Circuit.

Dated: August 19, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 201.154(c) of the Securities and Exchange Commission's Rules of Practice, Petitioners certify that the foregoing Motion for Stay and Brief in Support of Motion for Stay is 5,988 words in length, exclusive of the Table of Contents and Table of Authorities.

Dated: August 19, 2021

Thomas G. Hungar

CERTIFICATE OF SERVICE

I, Thomas G. Hungar, counsel for The Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC, hereby certify that on August 19, 2021, I served copies of the foregoing Motion for Stay and Brief in Support of Motion for Stay as indicated below:

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